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IN THE

Supreme Court of the United States

October Term, 1959

NO. 365

EUGENE D. GUTHRIE, *Petitioner*

VERSUS

SINCLAIR REFINING CO., *Respondent*

PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

To: *The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States:*

Petitioner, an injured seaman, respectfully prays that a Writ of Certiorari issue out of and under the seal of this Court to review the decision and judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas, rendered on January 15, 1959, which affirmed the judgment of the 127th Judicial District Court of Harris County, Texas, in favor of Respondent, rendered December 23, 1957.

OPINIONS BELOW

The judgment of the District Court of Harris County, Texas, rendered December 23, 1957, is appended hereto as Appendix "A".

The opinion of the Court of Civil Appeals for the First Supreme Judicial District, rendered on January 15, 1959, is reported in 320 S.W. 2d 397, and is appended hereto as Appendix "B". (Holding, despite a verdict on facts determining unseaworthiness, judgment cannot be entered for seaman unless a special issue submitting unseaworthiness in terms is a part of the jury charge; that it is not error to refuse special issues submitting particular items of negligence if any issue touching on an item of negligence is submitted; and that no issue on failure of shipowner-employer to comply with the duty of inspecting work spaces need have been submitted since seaman-employee was the engineer on watch and therefore responsible for the execution of ship owner's duty.)

The order of the Court of Civil Appeals affirming the District Court, rendered on January 15, 1959, is appended hereto as Appendix "C".

The order of the Court of Civil Appeals overruling Petitioner's Motion for Rehearing, rendered February 5, 1959, is appended hereto as Appendix "D".

The order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error, rendered on April 15, 1959, is appended hereto as Appendix "E".

The order of the Supreme Court overruling Petitioner's Motion for Rehearing, rendered on May 20, 1959, is appended hereto as Appendix "F".

JURISDICTION

The Supreme Court of Texas is the highest Court of Texas in which a decision in this cause could be had. Its order overruling Petitioner's Motion for Rehearing was entered May 20, 1959, 28 U.S.C., Sec. 2101(c).

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, U.S.C., Sec. 1257(3).

The applicability of Sec. 688, Title 46, U.S.C. (the Jones Act), which incorporates by reference Sec. 51 *et seq.*, Title 45, U.S.C. (Federal Employers' Liability Act), is in question in that the decision of the Court of Civil Appeals is repugnant to and nugatory of the Federal Statute enacted for the benefit of seamen. The decision of the Court of Civil Appeals is also repugnant to and nugatory of the General Maritime Law of the United States as declared by the decisions of this Court and the Courts of Appeals of the United States.

QUESTIONS PRESENTED FOR REVIEW

(1) Where unseaworthiness in fact is found by a jury's answers to special issues, is a State trial court in Texas free to hold that set of issues incomplete under Texas procedure because none contains the word "unseaworthiness" and, basing itself wholly upon local procedural law, deny to a seaman the substantive relief created by and existing under the federal law?

(2) Have the requirements of the Jones Act been obeyed by a Court's charge under the Texas special issue system which fails to define and to differentiate between those

duties imposed upon a shipowner-employer and those appropriate to the seaman-employee?

(3) Does an engineer on watch assume the risk of a negligent failure on the part of his employer either to provide for, or to accomplish, the inspection of the premises where the seaman is required to work?

STATUTES INVOLVED

The pertinent statutes involved are:

Sec. 688, Title 46, U.S.C. (The Jones Act). See Appendix "G".

Sec. 54, Title 45 U.S.C. (Federal Employers' Liability Act). See Appendix "H".

Art. III, Sec. 2, U. S. Const. and Tit. 28, Sec. 28, 1333(1), U.S.C. (". . . saving to suitors . . ."). See Appendix "I".

STATEMENT OF THE CASE

Petitioner seaman was injured in the engine room of the SS GEORGE McDONALD when a short, dirty, discolored piece of line, S.F. 26, lying unnoticed on the deck, rolled under his foot, S.F. 13, 14, causing him to fall in such a way that his left knee was wrenched. The case was submitted to a jury under the Texas special issue practice, Tr. 15 ff., and the jury found that Petitioner fell and suffered injury, proximately caused by the line, with resulting damages, Tr. 22. No definition of unseaworthiness was included in the Court's charge, and no issue containing the word "unseaworthiness" was submitted. A number of issues of negligence, with supporting definitions and instructions, tendered by Petitioners, were refused. Tr.

10-13. Petitioner moved for judgment, Tr. 23, urging that the issues as found declared unseaworthiness as a matter of law as well as of fact, it being uncontradicted that the line was not safe where it lay. S.F. 43, 53, 54, 90. Respondent made a similar motion, Tr. 32, urging that the entire cause of action for unseaworthiness had been waived by Petitioner's failure to tender a special issue inquiring in so many words if the presence of the line made the deck unseaworthy. The trial court overruled Petitioner, and entered judgment for Respondent. Tr. 32; Appendix "A".

Petitioner moved for a new trial, basing its motion upon this error and upon the errors of the trial court in failing to submit negligence in the manner requested by Petitioner. Failing in this motion, Petitioner appealed to the Court of Civil Appeals, where judgment for Respondent was affirmed, 320 S.W. 2d 397; Appendix "B"; and sought the Writ of Error in the Texas Supreme Court, which was denied. Appendix "E" Motion for Rehearing was overruled. Appendix "F". It is to review these erroneous rulings that Petitioner applies here for the Writ of Certiorari.

REASONS RELIED UPON FOR GRANTING THE WRIT

FIRST POINT

The Court of Civil Appeals, in holding that under Texas Procedure unseaworthiness cannot be the basis of a judgment for a seaman-employee (no matter what the jury findings) unless a special issue employing the term "unseaworthiness" has been submitted, has cut off a substantive right conferred by federal law (recovery for injury

caused by unseaworthiness, The Osceola, 189 U.S. 158, 23 S. Ct. 483, 1903) under the Constitution and Statutes of the United States relating to maritime causes. Article III, Sec. 2, U. S. Const.; Title 28, Sec. 1333(1), U.S.C. Petitioner timely raised the question by motion for judgment upon the jury verdict, Tr. 23, and by motion for new trial, Tr. 42. Both motions were overruled, and judgment was entered for Respondent. Tr. 32; Appendix "A". The question involved is a substantial one, for it touches upon the administration of federally created maritime rights in the State courts, under Title 28, Sec. 1333(1), U.S.C., the "saving to suitors" clause. Can a federal right survive the fragmentation to which it is subjected by the Texas special issue system? *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840 (1957). If it is to do so, it must be by clear directive from this Court. The action taken by the Court of Civil Appeals is against the current of a long line of decisions of this Court. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475 (1922); *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944); *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478 (C.C.A. 9th, 1953), aff'd 347 U.S. 396, 74 S.Ct. 601 (1954); *Yanow v. Weyerhaeuser Steamship Co.*, 250 F. 2d 74 (C.C.A. 9th, 1957), c.d. 356 U.S. 937, 78 S.Ct. 779 (1958).

SECOND POINT

The Court of Civil Appeals has decided a federal question of substance in a way not in accord with applicable decisions of this Court, by affirming, 320 S.W. 2d 401 through 403, Appendix "B", the failure of the trial court to submit the issues, definitions, and instructions on negli-

gence tendered by Petitioner, Tr. 10-13; so that local procedure has operated to deprive a seaman-employee, within the class protected by the Jones Act, of the substantive rights conferred on him by federal law, including his right to a jury trial of issues of negligence, *Bailey v. Central Vermont Railway*, 319 U.S. 350, 63 S. Ct. 1062 (1943); and *en passante*, has casually re-introduced the doctrine of assumed risk as a defense in Jones Act cases. 320 S.W. 2d 397, 401-403. Whatever may have been the status of assumed risk in Jones Act cases prior to 1939, it is a defense which was unequivocally outlawed by the 1939 amendment to the Federal Employers' Liability Act, since the Jones Act derives from the F.E.L.A. *Tiller v. Atlantic Coastline Railroad Co.*, 318 U.S. 54, 63 S.Ct. 444 (1943).

FIRST POINT

The trial court erred in failing to enter judgment for Petitioner on the ground of unseaworthiness; for unseaworthiness is demonstrated, as a matter of law, when it appears, as a fact, that any portion of a ship or her appointments is not reasonably fit for its purpose. The presence of a cord (or any other object or condition) on a deck which may reasonably be anticipated to cause injury (and does so) renders that portion of the deck *pro tanto* unseaworthy. Grillea v. United States, 232 F. 2d 919 (C.C.A. 2d, 1956); Crumady v. The Joachim Hendrik Fisser, 79 S.Ct. 445 (1959).

Although unseaworthiness is usually spoken of as a matter of fact, it is, like all such questions, a matter of law when facts are found which *determine* the issue, as

distinguished from facts which are merely evidentiary. At page 400 of 320 S.W. 2d, the Court of Civil Appeals recognized that unseaworthiness is a question of this dual character, but sought to distinguish the instant case from *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478 (C.C.A. 9th, 1953), aff'd 347 U.S. 396, 74 S.Ct. 601 (1954); *Pacific Far East Lines v. Williams*, 234 F. 2d 378 (C.C.A. 9th, 1956), c.d. 352 U.S. 871, 77 S.Ct. 96 (1957), and *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475 (1922). Although the Court understood that frost which made a hatch coaming slippery (Williams), a mislabelled can containing gasoline (Sandanger), and a block which breaks while in ordinary use (Petterson), are all conditions of fact making unseaworthiness as a matter of law, it refused to recognize that a length of line which, in practical effect, made the deck where it lay as slippery (and as dangerous) as if it were covered by an oil slick, was a condition which, once found, made unseaworthiness a matter of law.

The Court said, "We could no more hold as a matter of law that the presence of the short length of line rendered the vessel unseaworthy than we could hold as a matter of law that a spot of grease or oil, a piece of slippery paper, or an apple skin, rendered the vessel unseaworthy simply because it proximately caused a fall and injury." But *Yamon v. Weyerhaeuser Steamship Co.*, *supra*, declares the law in the following unequivocal terms: " . . . It is now long established law that a ship owner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby." It is not the extent of

the condition which decides unseaworthiness or not, but the fact determination of whether the condition creates that danger for which liability is imposed under the doctrine of unseaworthiness. In the instant case, the danger the line's presence created, the fact that safety required it to be tied up out of the way, is uncontradicted. S.F. 43, 53, 54, 90.

> "Q. Ordinarily when you make your inspections, if something like that is lying on the deck, you notice it?
> A. Yes, sir, and I pick it up and place it in a safe place." S.F. 43. . . .
> "Q. Why did you tie the rope onto the handrail?
> A. I thought that was the best thing to do with it, get it out of the way."
> "Q. . . . Apparently you consider it a safe practice to tie it onto the handrail?
> A. I did at that particular time." S.F. 53.

Added to such testimony is the unalterable fact of the accident. The occurrence of an accident is a fact element which weighs in the determination of the issue of unseaworthiness. Petterson, *supra*, at 479. From this matrix of fact emerges the jury's finding that Petitioner's injury was proximately caused by the line.

Is that a finding of an ultimate issue? Or merely one more evidentiary finding in a chain, requiring another issue to spell out its effect? Just here the Court of Civil Appeals failed to read the law as it now is, for in the teeth of Petterson, the Court declares, 320 S.W. 2d at 400, "By not requesting the submission of an issue for the determination of the jury on unseaworthiness, Appellant waived such ground of recovery." But Petterson declares,

ibid., that the implication may arise from the accident, and that, "it is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Mahnich v. Southern Steamship Co."

The language of the charge makes it crystal clear that this is an ultimate issue (in this case):

> "By the term 'proximate cause,' as used in this charge, is meant a cause which in a natural and continuous sequence, produces an event, and without which the event would not have occurred. And to be a proximate cause of an event it should be such a cause as that it could have been *reasonably anticipated and foreseen* by a person of ordinary prudence in the exercise of ordinary care, that the event or some similar event would result from such cause as a natural and probable consequence. There may be more than one proximate cause of an event." (Our emphasis)

The limiting terms " . . . by a person of ordinary prudence in the exercise of ordinary care, . . ." does not import negligence into this issue. The phrase modifies " . . . reasonably anticipated and foreseen . . .", giving the measure of reasonable anticipation. Negligence was defined in the preceding paragraph of the charge. Tr. 15. These two definitions have been approved many times by the Texas Courts, and nothing could be clearer than that the measure of reasonable anticipation is a separate element of a separate fact determination, under the Texas practice. A late declaration on the point appears in *Corpus Christi Speedway, Inc. v. Morton*, 279 S.W. 2d 903 (San Antonio Civ. App. 1955), no writ history, at 906. "Anticipation of consequences is a necessary element in determining both the questions of actionable negligence and

proximate cause." And see *Port Terminal Railroad Assoc. v. Ross*, 289 S.W. 2d 220 (1956), affg. 278 S.W. 2d 227 (Galveston Civ. App. 1955), in which the whole opinion is made to turn on the finding of foreseeability as an element of proximate cause, recognizing that a concurrent and *unforeseeable* proximate cause (employees' contributory negligence) does not erase the *fact* of foreseeability found by a jury verdict of proximate cause (reasonable anticipation of injury) against the employer. 289 S.W. 2d at 224. And see the landmark case on the point, *Carey v. Pure Distributing Co.*, 133 Texas 31, 124 S.W. 2d 847, rev'g 97 S.W. 2d 768. Even if it were not generally the Texas law that the content of the term "'proximate cause" includes reasonable anticipation, it would be the law of this case for the reason that that precise definition was made a part of the Court's charge.

It is the failure to appreciate Petitioner's recognition of, and reliance upon, this precise separation of the doctrines of negligence and cause, as embodied in the charge which Petitioner tendered to the Court and which was submitted by the Court, that has misled the Court of Civil Appeals, declaring that Petitioner had confused negligence and unseaworthiness, to read Special Issue No. 4 as merely evidentiary, rather than as a finding of ultimate fact. No condition of a ship's deck reasonably anticipated to cause injury can be said, after the injury has happened, to be a condition of seaworthiness. Petterson, *supra*; *Poignant v. United States*, 225 F. 2d 595 (C.C.A. 2d 1955); *Grillea v. United States*, 232 F. 2d 919 (C.C.A. 2d 1956); *Ross v. Steamship Zeeland*, 240 F. 2d 820 (C.C.A. 4th, 1957); *Bentley v. Albatross Steamship Co.*, 203 F. 2d 270 (C.C.A. 3d, 1953). No deck, intended and used for walking, is reasonably fit for that purpose if it is reason-

ably foreseeable that the presence of a foreign object on it may cause injury. *Yanow v. Weyerhaeuser, supra.* Cf. the comments on anticipation of injury as an element of unseaworthiness in *Mejic v. Kea Steamship Corporation*, 260 F. 2d 747 (C.C.A. 3rd, 1958):

Nor does this reading of Special Issue 4, coupled with its underlying definition, import considerations of notice, time, and the like into the issue. The proximate cause issue is never an inquiry into time, notice, or actual knowledge. It asks three things: Was there a physical relation between A and B such that A may be said to have caused B? Would B have occurred without A? Given A, was an event of the class of B reasonably foreseeable? Carey, *supra*; *Port Terminal Railroad Assoc. v. Ross, supra.* By their affirmative answer to Special Issue No. 4, the jury have found *all three* of these questions in Petitioner's favor, and neither the Trial Court nor the Court of Civil Appeals was free to lop off and treat as not found the third of the three. The Court had no more in Petterson: "The Court below found that the block was used 'in a customary and usual manner' and that it 'was of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question' . . . While being put to a proper use in a proper manner, the block broke causing the injuries complained of to Petterson." 295 F. 2d at 479.

Petitioner might have argued that the uncontradicted evidence about the physical presence of the line and its menace being what it was, he had no need for a fact finding; but he is not compelled to make that argument. He submitted the issue of unseaworthiness in Special Issue 4 and in the definition governing it. If Respondent wished

that definition and issue not to be submitted so as to accomplish that end, it ought to have tendered, in writing, a substantially correct definition and issue which did not do so. Having failed in that, its objection that unseaworthiness was not submitted is meaningless.

Nor does the Court's holding, 320 S.W. 2d 400, that unseaworthiness was waived as a ground of recovery by not requesting its submission in *terms*, depict the law of Texas in such matters. Many questions of "fact" in Texas are presented without the tautologous use of the word or idea explored by a special issue or set of special issues. For example, negligence is often submitted in a form such as the following: "Do you find that the Plaintiff failed to keep such a lookout for other traffic, including Defendant's vehicle, as would have been kept by a person of ordinary prudence, in the exercise of ordinary care, under the same or similar circumstances?" *Buchanan v. Lang*, 247 S.W. 2d 445 (Waco Civ. App. 1952), err. ref. n.r.e. An affirmative finding on such an issue is a finding of negligence. Such submission has been so often made as to be a recognized form of the issue, *Stayton v. Contreras*, 150 S.W. 2d 342, 345 (Galveston Civ. App. 1941), err. ref.; and even to be suggested by the Court, *Lander v. Jordan*, 87 S.W. 2d 1109, 1110 (San Antonio Civ. App. 1935).

The submission of "legal fraud" without employing the word "fraud" is a legal stereotype in Texas. Paraphrasing, the form of the issues is as follows: Did Defendant make a representation to Plaintiff? Did Plaintiff rely on that representation? Was the representation false in fact? Would Plaintiff have entered into the agreement had not the representation been made? Affirmative answers to all the questions in the series make a determination of "legal fraud".

An illustrative case in point is *Texas Power & Light Co. v. Jezek*, 302 S.W. 2d 196 (Waco Civ. App. 1957), ref. n.r.e. In that case, the only issue of liability found for the Plaintiff is paraphrased by the Court, at 197, ". . .that the placing of the electric wire less than 40 inches above the telephone messenger wire was a proximate cause of the injury to Jezek; . . . " Judgment for Plaintiff was affirmed. And in *Thomas v. Kansas City Southern Railway Co.*, 305 S.W. 2d 642 (Beaumont Civ. App. 1957); c.d. 356 U.S. 959, 78 S. Ct. 995 (1958), the key question of liability was whether a board used as a handhold was within the contemplation of the safety appliance acts. The Trial Court and the Court of Civil Appeals treated the surplus evidentiary issues as immaterial, and recognized that the key question was one for the Court. The only difference between Thomas and the instant case is that the absolute liability tested in Thomas is one imposed by statute, and the absolute liability with which we deal here is imposed by the General Maritime Law.

This case presents another instance where the objective effect of the decisions of the Texas Courts is that, under the guise of local practice, federally created rights have been denied a seaman despite a jury verdict favorable to him. Upon the record in this case, Certiorari ought to be granted, and upon hearing, the Court of Civil Appeals ought to be reversed and judgment rendered for Petitioner.

POINT TWO

In discussing the failure of the trial court to charge the jury in accordance with the applicable decisions of this and other federal Courts, we must keep in mind the framework of this Court's recent decisions dealing with Texas

procedure in this field. Since the Jones Act, Title 46, Sec. 688, U.S.C., derives from the Federal Employers' Liability Act, Title 45, Sec. 51 *et seq*, U.S.C., decisions involving the F.E.L.A. are also determinative of similar matters arising under the Jones Act. In *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840 (1957), and in *Deen v. Gulf, Colorado & Santa Fe Railway Co.*, 353 U.S. 925, 77 S.Ct. 715 (1957), this Court has had occasion to write, at some length, on Texas procedure as it operates to stifle federal rights. In Deen, the Texas Courts had, once again, substituted their judgment on negligence for that of the jury. The reversal was based upon the reasoning of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957), and the cognate cases decided the same day. In Arnold, this Court specifically laid it down that not even the system of special issues, so integral a part of Texas trial practice and of the mental furniture of Texas trial lawyers, can operate to cut off, or reduce, a substantive right conferred by federal statute. The Court of Civil Appeals in that case, 283 S.W. 2d 305 (1955), had reversed and rendered a judgment for Plaintiff based on a jury verdict which found every specific issue of negligence against Plaintiff, but a single issue on the general question of the safety of the work place in his favor. The Court of Civil Appeals, at 305, adopted the reasoning of *Harbin v. City of Beaumont*, 146 S.W. 2d 297 (Beaumont Civ. App.), " . . . where [plaintiff] had pleaded specific facts invoking [defendant's] duty to guard a hole in the street in which [plaintiff] was working, the additional allegation that [defendant] was guilty of negligence in failing to furnish Harbin a reasonably safe place in which to work was a legal conclusion flowing from the specific facts and was

not a plea of a special act of negligence," and held, *ibid.*, that, "a general finding that [defendant] failed to furnish [plaintiff] with a safe place to work cannot stand in the face of the specific findings of the jury exonerating . . . [defendant] . . . of any negligence proximately causing [plaintiff's] injuries." This Court reversed that holding, declaring that there was no conflict between the issue of safe place to work and the specific issues of negligence. But the Court went further: "The Petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for, '. . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L.Ed. 143." 77 S.Ct. at 841.

Davis v. Wechsler contains the following salutary language, 44 S. Ct. at 14: "If the Constitution and Laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." And see *American Railway Express Company v. Levee*, 263 U.S. 19, 44 S. Ct. 11 (1923), at 13, "The law of the United States cannot be evaded by the forms of local practice." These familiar principles have been lately recognized and newly applied by many courts, including those of Texas. Thus the State rule of *res ipsa loquitur*, a rule of evidence, may not be applied in an FELA action. *Morris v. T. & N.O. Railroad Company*, 269 S.W. 2d 565 (Beaumont Civ. App. 1954), ref. n.r.e. The submission of such cases

is controlled by federal law. *Texas & Pacific Railway Company v. Younger*, 262 S.W. 2d 557 (Fort Worth Civ. App. 1953), ref. n.r.e.; *MKT Railroad Company of Texas v. Webb*, 229 S. W. 2d 204 (Dallas Civ. App. 1950), ref. n.r.e.

A State is not free to divide the facts, choosing which shall be for the Judge and which for the jury. *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359, 72 S. Ct. 312 (1951). Nor can a state's "local practice" serve to sanctify a dismissal on the ground that no cause of action is pleaded, when in fact, under federal law, the petition states a cause of action. *Brown v. Western Railway of Alabama*, 336 U.S. 294, 70 S. Ct. 105 (1950), paralleled by *Kansas City Southern Railway Company v. Chandler*, 192 S.W. 2d 304 (Beaumont Civ. App. 1945). The Courts of Texas may not assess "negligence" or "proximate cause" in a manner different from that of the federal decisions, *Port Terminal Railroad Association v. Ross*, 289 S.W. 2d 220 (1955) at 226: ". . . the question of what constitutes negligence, and the *sufficiency of the evidence* to raise that question for the jury, is to be determined by the applicable federal decisions." (Our emphasis.) So, in Ross, the Court held that the foreseeability of injury was a jury question; and having been resolved against defendant, the railroad company was liable in damages even though the Court assumed, 289 S.W. 2d at 224, that Ross' failure to seek assistance could not reasonably be foreseen. That it is the duty of the trial court (whether a Federal or State trial Court) to clarify the issues before the jury by appropriate instructions that depict the framework of the seaman's field of duty, see *Cox v. Esso Shipping Company*, 247 F. 2d 629 (C.C.A. 5th, 1957).

And the point of the *Arnold* case, *supra*, is that a defendant in a Texas Court cannot, by virtue of the Texas special issue system, escape from liability if his negligence, in whole or in part, was a cause of injury to his employee; and the charge must allow the jury a fair opportunity to decide if that was the case. A Texas Court is not free to substitute its judgment for that of the jury as to what is "reasonably fit" or "reasonably safe". See *Thompson v. Gibson*, 290 S.W. 2d 305 (Fort Worth Civ. App. 1956), reversed and rendered 298 S.W. 2d 97 (1957), reversed *per curiam* 78 S. Ct. 2 (1957), order in compliance 310 S.W. 2d 564 (1958). The Court of Civil Appeals had affirmed a trial Court judgment for plaintiff based on a jury verdict. The key negligence question was whether "rocks" or "stones" of larger than usual size in a gravelled yard otherwise unexceptionable could constitute a negligent failure to furnish a reasonably safe place to work. The Texas Supreme Court reversed and rendered *on this point*, holding that there was *no evidence* the gravelled yard, under all the circumstances, was not a reasonably safe place in which to work, and citing with approval *Rogers v. Thompson*, 284 S.W. 2d 467 (S. Ct., Missouri). This was the wrong case to cite, for it was reversed by this Court, 352 U.S. 500, 77 S. Ct. 443, expressly criticising the opinion of the Missouri Supreme Court for attaching determinative weight to the claimant's admission that it was "his primary duty" to watch the fire which, erupting into larger flames, frightened him onto a gravelled culvert where he slipped.

But the plain statement of the law (to which no one will except), that a defendant cannot escape liability if his negligence is in whole or in part a cause of injury to an

employee, does not execute itself. For it to have meaning requires that Texas juries be given an opportunity to pass on a set of issues, supported by proper definitions, the answers to which will provide a determination of liability within the framework of applicable law.

It is not only in a failure to submit all the issues required, or all the controlling issues, that a Court may err. More to the point, and more erroneous, may be a subtle distortion of the matrix in which these cases lie, so that by failure to distinguish between the various standards of duty of the employer and that of the employee, the Court may create an atmosphere in which the jury's deliberation, however conscientiously carried out, must be erroneous because based on wrong assumptions. Of special pertinence in this connection is *Yanow v. Weyerhaeuser Steamship Company*, 250 F. 2d 74 (C.C.A. 9th, 1958), in which the Court declared, at 75, 76:

> ". . . it is now long established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease."

The erroneous instruction there complained of had told the jury that they need deliberate no further if they had found that the plaintiff's injuries were caused by an unavoidable accident. Plainly, this is not the law, since unseaworthiness is a species of liability without fault. By thus distorting the framework in which the jury considered the *Yanow* case, the Court had assured an erroneous verdict.

The import of Arnold, Rogers, and Gibson, supra, with the older cases cited above, is that *no* Court, including the state trial Court, may substitute its judgment for that of a jury on the crucial issues under these federal acts, whether it be by preventing the case from reaching the jury, *Broun v. Western Railway of Alabama, supra*, or by reliance upon local rules of procedure, Arnold, *supra*. This Court has recently made it clear that this broad principle extends to and includes the general maritime law and the doctrine of unseaworthiness by declaring that the three year statute of limitations included in the Jones Act, rather than the two year Texas statute, controls a cause of action for unseaworthiness in a Texas Court. *McAllister v. Magnolia Petroleum Company*, 78 S. Ct. 1201 (1958).

Therefore it was error for the learned trial Court to refuse Petitioner's requested Sp. Iss. 15 and its supporting issues and instructions, for the reason that in so doing the Court failed to submit issues based on all the evidence upon which the jury might have found Guthrie's place of work not to be reasonably safe. For instance, no issue was submitted upon which the undisputed fact of the light's being out had bearing. It was undisputed that the line lay in shadow, S.F. 84, 85, and no issue was submitted on which that fact was evidentiary. If Petitioner's requested Sp. Iss. 15, 16 and 17 had been submitted, the jury would have been enabled to pass on the entire circumstances surrounding Guthrie's accident. Those issues read as follows:

SPECIAL ISSUE NO. 15

"Do you find from a preponderance of the evidence that Defendant failed to furnish to Eugene D. Guthrie,

at the time and on the occasion of his injury, if any, a reasonably safe plane in which to work?

Answer 'We do' or 'We do not.'"

"In connection with this issue and the one following you are instructed that the duty of the employer to furnish a reasonably safe place to work, in a maritime case, is an absolute one. It is not satisfied by the mere exercise of ordinary care."

SPECIAL ISSUE NO. 16

"Do you find from a preponderance of the evidence that the failure of Defendant, if any, to furnish a reasonably safe place in which to work to Eugene D. Guthrie was a proximate cause of Eugene D. Guthrie's injury, if any?

Answer 'We do' or 'We do not.'"

SPECIAL ISSUE NO. 17

"Do you find from a preponderance of the evidence that the failure, if any, of Defendant to furnish a reasonably safe place in which to work to Eugene D. Guthrie was negligence on the part of Defendant, as that term has herein been defined to you?

Answer 'We do' or 'We do not.'"

Upon the single issue submitted, number five, inquiring whether the presence of the line, *without more*, made that part of the deck where it lay not a reasonably safe place to work, the jury were debarred from anything save the consideration of the line's naked presence on the deck. That such a submission as Petitioner sought was correct, even before Arnold, *supra*, see *City of Denton v. White*, 179 S.W. 2d 834 (Fort Worth Civ. App. 1944), ref. w.o.m.

The failure to submit issues, tendered in writing and in proper language, was compounded by the Court's refusal of the general instruction offered by Petitioner, so that even the issue on safe place to work actually submitted by the Court was considered by the jury without the guidance of a proper instruction. It was just here that the trial Court failed in *Cox v. Esso Shipping Company*, 247 F. 2d 629 (C.C.A. 5th, 1957). By not distinguishing the standards of care exacted of the seaman and the shipowner, in various relations, the Court allowed the jury to consider the case without sufficient guidance to assure a proper verdict within the framework of the maritime law. By equating the negligence of the seaman with that of the shipowner and with the shipowner's duty to provide seaworthy gear (see note, 247 F. 2d 631), the Court committed reversible error. That is exactly what took place in the instant case. The instruction sought by Petitioner was:

> ". . . but the obligation to furnish a safe place to work is not measured by the standard of ordinary care, as given you in the definition of negligence above. The duty to furnish a safe place to work is an absolute one. That is to say, defendant herein was obligated to furnish plaintiff and other similar workers a safe place to work, and to keep the place safe while plaintiff and other similar workers were there. The obligation is a continuing one. It is not a duty which can be contracted away, for it is a duty imposed by the maritime law, and it cannot be delegated. If the injuries of plaintiff were caused both by defendant's not having furnished a safe place to work and not having kept it safe, and by the negligence of plaintiff, if any, defendant would not be relieved of its duty, for that duty is an absolute one, imposed by

> the maritime law; and as you have already been instructed, there may be more than one proximate cause."

See Judge Frank's concurring opinion in the *Poignant* case, 225 F. 2d at 602. The duty is non-delegable, since any other approach would enable the shipowner to escape all his liabilities by contracting them away. *Sieracki*, 66 S. Ct. 872, *passim*; *Rothman v. U-Steer-It, Inc.*, 247 F. 2d 803 (C.C.A. 5th, 1957) (no attempt to contract away unseaworthiness can be effective).

As for the refusal of Petitioner's requested Sp. Iss. 9, "Do you find from a preponderance of the evidence that the defendant failed in its duty to inspect Eugene D. Guthrie's place of work," this is an issue clearly raised by the evidence. It is undisputed that no inspection was made during Guthrie's watch, and indeed, by contract, none was to be made, no personnel of the class charged with clean-up work being assigned to that watch. See union contracts involved, S.F. 104, 105, 106, 107, 108. Petitioner was forbidden by contract to do clean-up work, S.F. 104. His own rounds had nothing to do with inspecting floor plates, but related only to the ship's plant. His duty was the duty of ordinary care; and he would have complied with it with respect to this rope if, having seen it, he had picked it up. He never saw it before he was injured by it. S.F. 85.

But Sinclair does not escape from its responsibility to inspect, neither by contract nor by reliance on Guthrie. The law is plain as to the duty: "The employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the

safety of the employees. The employee has a right to rely upon the performance of this duty by the employer and to govern his actions accordingly. . . . Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this act assume the risks of such danger." *Williams v. Atlantic Coastline Railroad Co.*, 190 F. 2d 744 (C.C.A., 5th, 1951).

It is on this point of law that the Court of Civil Appeals declared, 320 S.W. 2d 402:

> "We think the Court properly refused this issue and the instruction in connection therewith. Appellant stood the twelve to four a.m. watch in the engine room where the injury occurred at two o'clock a.m. As third engineer on watch it was his responsibility, according to his testimony, to make inspection to determine the presence of gear adrift about the deck.
>
> ". . . The Court submitted Sp. Iss. No. 12 inquiring whether Appellant (Petitioner) failed to make a proper inspection of the area in question during the two hours he was on watch prior to his fall, and the jury answered in the negative. Since Appellee's (Respondent's) duty of making a proper inspection, though non-delegable, *was reposed for the time in Appellant*, the jury's findings should be construed as exonerating Appellee of any failure to make a proper inspection." (Our emphasis.)

On its face, and in its effect, this quotation indicates that the Court of Civil Appeals, though studiously avoiding the words, decided this point upon the doctrine of assumed risk. The Court held it proper to refuse the tendered special issue because, it says, after all, the responsibility was Petitioner's. Aside from the Court's misreading of the con-

tract provisions, which barred Petitioner from himself performing sanitary work in the engine room, and gave him no utility worker to do the work on the night watch in question, the Court has erred fundamentally in its understanding of the law. No extended discussion of the outlawed doctrine of assumed risk is necessary since the unequivocal language of *Tiller v. Atlantic Coastline Railroad Company*, 318 U.S. 54, 63 S. Ct. 444 (1943). To say that a non-delegable duty may be "reposed" in an employee so as to make a failure of that duty negligence on his part is logic chopping of the worst kind. The failure to submit the issue requested by Petitioner and its supporting instruction deprived Petitioner of a jury trial on a specific issue of negligence, raised by the evidence. This is the failure to comply with the Seventh Amendment which was held erroneous in *Bailey v. Central Vermont Railway*, 319 U.S. 350, 63 S. Ct. 1062 (1943). In addition, by placing its holding upon a basis which can only be understood to be assumed risk, the Court of Civil Appeals has flown full in the face of the decisions of this Court and the Statutes of the United States, Title 45, Sec. 54, U.S.C.

The last instance of such deprivation in the instant case is the refusal of the Court below to submit Petitioner's requested Sp. Iss. 12 and its supporting issues. Sp. Iss. 12 read, "Do you find from a preponderance of the evidence that a fellow employee of Eugene D. Guthrie left the line, if any, on the deck at the place where Eugene D. Guthrie suffered injury, if any?" This question was raised by the evidence, in particular, at S.F. 53 and 54, "they were painting in there, I do not know whether they were using it to tie a bucket, but I do not know;" and at S.F.

85, where Mr. Guthrie testified and demonstrated that the line, properly tied, would stay on the hand rail. Petitioner does not deny that the submission of this issue would have required speculation by the jury. Petitioner asserts that it is the sort of speculation which jurors are required to perform in the execution of their duty. In *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 76 S.Ct. 608 (1956), the decedent had been drowned over the side of a tug on which he was employed. His duties required him to be aboard any of four tugs docked together. He was the only man aboard the vessels, three of them being completely unlighted, and one only partly lighted. He disappeared, and the body was not found for several weeks. This Court held that was sufficient evidence to take the case to the jury, declaring, 76 S. Ct., 610: "Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties." In *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740 (1946), another death case, this Court declared, "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute

in a reviewing Court. . . . *It is no answer to say that the jury's verdict involved speculation and conjecture.* Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." (Our emphasis.)

The charge of the learned trial Court, for each and all the reasons hereinabove set out, fell short of the standard required of charges in the trial of cases of this kind. For the errors committed, it is respectfully urged that certiorari be granted to review the cause, and that, upon hearing, the judgment of the Court of Civil Appeals be reversed and remanded for a new trial, free of those errors.

Respectfully submitted,

MANDELL & WRIGHT

By _____

Attorneys for Petitioner
707 South Coast Building
Main at Rusk Avenue
Houston 2, Texas

Of Counsel:
ARTHUR J. MANDELL

I, ARTHUR J. MANDELL, an attorney in the offices of Messrs. Mandell & Wright, attorneys of record for Eugene D. Guthrie, Petitioner herein, depose and say that on the ____ day of _____, 1959, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Sinclair Refining Company, Respondent herein, by mailing the same via United States mail to Messrs. Baker, Botts, Andrews & Shepherd, Esperson Building, Houston, Texas, attorneys of record for said Sinclair Refining Company.

_____
Arthur J. Mandell

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this ____ day of August, 1959.

_____
Notary Public in and for
Harris County, Texas

APPENDIX "A"

NO. 459,166

EUGENE D. GUTHRIE) IN THE DISTRICT COURT
vs.) OF HARRIS COUNTY,
SINCLAIR REFINING) TEXAS, 127 JUDICIAL
COMPANY) DISTRICT

JUDGMENT

BE IT REMEMBERED that on the 19th day of November, 1957, came on to be heard the above entitled and numbered cause, whereupon, came the plaintiff, Eugene D. Guthrie, in person and by and through his attorney of record, and also came the defendant, Sinclair Refining Company, by and through its attorneys of record, whereupon all parties announced ready for trial and a jury of twelve duly qualified jurors, to-wit: F. M. Allen and eleven others, were duly drawn, impaneled and sworn in to try said cause, and then said cause proceeded to trial. Whereupon the parties continued to adduce their evidence until the 20th day of November, 1957, when both parties announced in open court that they had rested and the case was thereafter, upon the 21st day of November, 1957, submitted to the jury upon the following special issues, to-wit:

"SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that on or about July 26, 1955, Eugene D. Guthrie fell in the engine room of the SS GEORGE McDONALD?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 1, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that at the time of his fall, if any, aboard the SS GEORGE McDONALD, Eugene D. Guthrie suffered an injury to his left knee?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 2, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that at, and immediately prior to, the time Eugene D. Guthrie suffered injury, if any, there was a short length of line on that portion of the deck where he fell, if you have found that he fell?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 3, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that the line, if any, was a proximate cause of injury, if any, to Eugene D. Guthrie?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 3, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 5

Do you find that at, and immediately prior to, the time Eugene D. Guthrie suffered injury, if any, the presence of the line, if any, made that part of the deck where it lay not a reasonably safe place to work?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 5, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that such condition of the deck, if you have so found, was a proximate cause of Eugene D. Guthrie's injuries, if any?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 6, 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that such condition of the deck, if you have so found, was negligence on the part of Defendant, as the term negligence has been herein defined to you?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 7 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of Eugene D. Guthrie's injuries, if any?

Answer 'We do' or 'We do not'.

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that just before the accident in question, if any, Plaintiff failed to keep such a lookout as a reasonably

prudent person in the exercise of ordinary care would have kept under the same or similar circumstances?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 9 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that such failure to keep such a lookout, if you have so found, was a proximate cause of Plaintiff's injuries, if any?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 9 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that such failure to keep such a lookout, if you have so found, was the sole proximate cause of Plaintiff's injuries, if any?

Answer 'We do' or 'We do not'.

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that the plaintiff, Eugene D. Guthrie, failed to make a proper inspection of the area in question during the two hours he was on watch, prior to his alleged fall?

Answer 'We do' or 'We do not'.

By the term 'proper inspection', as used in this charge, is meant such inspection as would have been made by an ordinarily prudent person in the exercise

of ordinary care under the same or similar circumstances.

If you have answered Special Issue No. 12 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such failure to make a proper inspection, if you have so found, was a proximate cause of the alleged fall?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 12 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that such failure to make a proper inspection, if you have so found, was the sole proximate cause of the alleged fall?

Answer 'We do' or 'We do not'.

If you have answered Special Issue No. 10 or Special Issue No. 13 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 15

To what extent, if any, do you find from a preponderance of the evidence such negligence of the plaintiff, Eugene D. Guthrie, caused the plaintiff's alleged accident aboard the SS GEORGE McDONALD?

Answer by stating the amount, if any, in percentage.

SPECIAL ISSUE NO. 16

Do you find from a preponderance of the evidence that the accident in question, if any, was not an unavoidable accident, as that term is hereinafter defined to you.

Answer 'It was not the result of an unavoidable accident' or 'It was the result of an unavoidable accident'.

By the term 'unavoidable accident', as used herein, is meant the unforeseen and unanticipated happening of an event occurring without either the Defendant or the Plaintiff being guilty of negligence that proximately caused the accident in question, if any.

SPECIAL ISSUE NO. 17

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would adequately and reasonably compensate the plaintiff, Eugene D. Guthrie for such injuries and damages, if any, that were directly and proximately caused and will in reasonable probability be directly and proximately caused in the future, if any, by reason of the injuries sustained by him on the 26th day of July, 1955, if any, taking into consideration the following elements of damage and none other.

(a) Physical pain and suffering, if any, suffered by Eugene D. Guthrie from July 26, 1955, down to the date of trial;

(b) Mental anguish, if any, suffered by plaintiff Eugene D. Guthrie from July 26, 1955, until the date of trial;

(c) Physical pain and suffering, if any, that you may find from a preponderance of the evidence will in reasonable probability be suffered by Plaintiff Eu-

gene D. Guthrie in the future and beyond the date of this trial;

(d) Mental anguish, if any, that you may find from a preponderance of the evidence will in reasonable probability be suffered by Eugene D. Guthrie in the future and beyond the date of trial;

(e) The present reasonable cash value of the loss, if any, to plaintiff Eugene D. Guthrie, including the reasonable value of his meals and lodging, if any wages which you may find from a preponderance of the evidence he reasonably would have earned from July 26, 1955 until October 13, 1955, and did not earn during that period because of his injury and/or disability, if any;

Answer by stating the amount in dollars and cents as to each element of damages, if any.

In answering this issue you will not take into consideration nor allow plaintiff any sum of money for the reasonable value of meals and lodging from July 26, 1955 to September 23, 1955.

In answering this issue you will not award any damages or allow anything for pain or suffering, loss of earnings or earning capacity solely resulting from plaintiff's accident aboard the SS MAYO LYKES during March of 1956, or resulting from any conditions of his body, other than his left knee, or resulting from conditions of his left knee which existed prior to July 26, 1955, except to the extent that such prior condition may have been aggravated as a result of such injury on July 26, 1955, if you find it was aggravated, and then only to the extent of such aggravation, if any.

After the arguments of counsel, the jury, on said 21st day of November, 1957, retired to consider their verdict

and answers to said special issues, and on the 21st day of November, 1957, returned into open court the following verdict and answers, to-wit:

"We, the jury, answer the special issues submitted to us as follows:

SPECIAL ISSUE NO. 1—'We do'
SPECIAL ISSUE NO. 2—'We do'
SPECIAL ISSUE NO. 3—'We do'
SPECIAL ISSUE NO. 4—'We do'
SPECIAL ISSUE NO. 5—'We do not'
SPECIAL ISSUE NO. 6—Not answered
SPECIAL ISSUE NO. 7—Not answered
SPECIAL ISSUE NO. 8—Not answered
SPECIAL ISSUE NO. 9—'We do not'
SPECIAL ISSUE NO. 10—Not answered
SPECIAL ISSUE NO. 11—Not answered
SPECIAL ISSUE NO. 12—'We do not'
SPECIAL ISSUE NO. 13—Not answered
SPECIAL ISSUE NO. 14—Not answered
SPECIAL ISSUE NO. 15—Not answered
SPECIAL ISSUE NO. 16—'It was the result of an unavoidable accident'
SPECIAL ISSUE NO. 17—(a) $500
(b) -0-
(c) -0-
(d) -0-
(e) $1878
/s/ F. M. Allen

Said verdict and answers of the jury were received in open court, and after each and all of said jurors declared the same to be their verdict, the said verdict was ordered filed and the jury ordered discharged. Whereupon, a motion having been made, and notice having been duly given and the Court having duly heard and considered a motion

for judgment on the verdict, and the Court being of the opinion, and the Court here and now finding, that under the pleadings, evidence, stipulations and the verdict of the jury, judgment should be rendered herein in favor of the defendant, Sinclair Refining Company and against the plaintiff, Eugene D. Guthrie, and that plaintiff take nothing against the defendant on his suit, it is therefore;

ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Eugene D. Guthrie, take nothing from the defendant, Sinclair Refining Company, on this suit. It is further,

ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Sinclair Refining Company, recover all Court costs herein against plaintiff, Eugene D. Guthrie.

DATED AND ENTERED this 23rd day of December, 1957.

/s/ WILLIAM M. HOLLAND
Judge Presiding

APPROVED AS TO FORM:

MANDELL & WRIGHT

By /s/ Ben N. Ramey
Attorneys for Plaintiff

BAKER, BOTTS, ANDREWS
& SHEPHERD

By /s/ Frank G. Harmon
Attorneys for Defendant

APPENDIX "B"

EUGENE D. GUTHRIE, APPELLANT,
NO. 13294 VS.
SINCLAIR REFINING COMPANY, APPELLEE.

Appeal from 127th District Court of Harris County

Appellant, Eugene D. Guthrie, third engineer of the SS MacDonald, brought this suit under the Jones Act and for unseaworthiness against appellee, Sinclair Refining Company, to recover for personal injuries sustained by him about 2 o'clock a.m., July 26, 1955, when he stepped on a short length of line which lay on a lower deck level to which he had descended from the operating platform for the purpose of replacing a light bulb which had just burned out. The line was some 7 to 12 inches in length and about the size of an ordinary sash cord. It was located about 6 feet from the light bulb which had burned out and about 6 inches from the edge of the operating platform. Appellant testified that he could see the area of the lower deck where the line lay from the operating platform. Even after the light bulb burned out there was sufficient light to see the floor plates of the deck on which the line lay.

Unseaworthiness, as a ground of recovery, was not submitted to the jury, nor did appellant request submission of any issue or instructions thereon. The case was submitted under the Jones Act and the jury exonerated both appellant and appellee of negligence by finding unavoidable

accident. The court rendered judgment on the verdict for appellee.

Appellant's first Point of Error is to the effect that the finding of the jury that the line in question was a proximate cause of injury to appellant required judgment for him on the ground of unseaworthiness.

The court gave the usual definition of "proximate cause", including the elements of foreseeability and reasonable anticipation.

Appellant argues that the jury, in finding that the line was a proximate cause of appellant's injury, in effect found that it could reasonably have been anticipated that someone would step on the line and be injured, and that, therefore, the part of the deck where the line lay was necessarily unseaworthy.

With this contention we do not agree. It seems evident that appellant is confusing his alleged two grounds of recovery. Negligence to be actionable must be a proximate cause of the injury. Anticipation and foreseeability are important considerations in determining liability for negligence. Seaworthiness vel non is not dependent upon either negligence or foreseeability. The fact that some small foreign substance on the deck proximately caused appellant to fall no more establishes unseaworthiness as a matter of law and in the absence of a jury finding, than does the finding of proximate cause establish common law liability without a finding of negligence. Unseaworthiness is essentially a species of liability without fault. A shipowner's liability for unseaworthiness is absolute regardless of the presence or absence of negligence or proximate cause in the legal sense. Seas Shipping Company, Inc. vs. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946).

It was not shown how the line got on the deck or how long it had been there. Appellant testified that he did not see it until after he had fallen. If the presence of a line 7 to 12 inches long and about the size of a sash cord or a pencil, as a matter of law, rendered that part of the deck unseaworthy where the line lay, then it would be our duty under decisions of the Supreme Court of the United States to reverse the case and render judgment for appellant for the sum of $2,378.00, representing $500.00 which the jury found for physical pain and suffering from the date of injury to the trial, and $1,878.00 which the jury found to be the reasonble cash value of the loss to appellant, including meals and lodging and wages he reasonably would have earned from July 26, 1955, to October 13, 1955, but for the injury.

Ordinarily unseaworthiness allegedly arising from the presence of a transitory substance on a deck is a matter for the determination of the jury or court as a fact issue. Poignant vs. United States (Second Circuit 1955), 225 F. 2d 595; Troupe vs. Chicago, Duluth & Georgian Bay Transit Company (Second Circuit 1956), 234 F. 2d 253; Carter vs. Schooner Pilgrim, Inc. (First Circuit 1956), 238 F. 2d 702.

Appellant either abandoned unseaworthiness as an independent ground of recovery or else concluded that a finding by the jury that the line was a proximate cause of appellant's injury would, as a matter of law, establish unseaworthiness. We are of the opinion that by not requesting submission of an issue and instructions on unseaworthiness appellant has waived that ground of possible recovery in the same manner as the plaintiff waived such ground of recovery by not pleading it in the case of

Keplinger vs. American Mail Line, Ltd. (W.D. Washington 1956), 11 American Maritime Cases 2318.

Some courts have denied liability in cases involving a transitory condition where the vessel or appliance is inherently sound and the danger has resulted from a foreign substance of a transitory nature. Cookingham vs. United States, 184 F. 2d 213 (Third Circuit 1950); Shannon vs. Union Barge Line (Third Circuit), 194 F. 2d 584. In Daniels v. Pacific-Atlantic Steamship Co., (E.D.N.Y. 1954), 120 F. Supp. 96, the Court stated:

> "The weight of authority is that an injury caused by slipping on a spot of oil or other matter of a transitory nature in and of itself does not support a cause of action for damages for unseaworthiness."

See also McDaniel v. Dingwall Shipping Company, (S.D. Tex. 1954), 135 F. Supp. 374, in which the Court stated:

> "The cases upon which the Libelant places principal reliance, Pope & Talbot, Inc. v. Hawn, supra; Seas Shipping Co. v. Sieracki, supra; Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, and others, show the relationships to which the unseaworthiness doctrine has been extended, but do not, in my opinion, apply the doctrine to a case where, as here, the vessel or the appliance in question is inherently sound and where the danger results from a foreign substance placed there by an undisclosed person at an indeterminative time prior to the accident."

In Spero v. The Argodon, (E.D. Va. 1957), 150 F. Supp. 1, a third engineer slipped on oil on the floor of the engine room and fell through a floor where a floor-

plate had been removed. Beyond question the removal of the floorplate was sufficient to constitute unseaworthiness in itself. The Court stated:

> "The presence of oil on the engine room floor would not, standing alone, be sufficient to impose liability for unseaworthiness under the facts of this particular case, but the combination of circumstances leads to the conclusion of liability."

Appellant contends, however, that in the case of Poignant vs. United States, 225 F. 2d 595, the Court reversed the decision of the trial court in dismissing the libel, alleging unseaworthiness causing injuries which resulted from slipping on an apple skin or some piece of garbage on the floor of a passageway on the vessel. In such case it was found that the vessel had no garbage disposal chutes, and the practice was at the conclusion of each meal to pull large cans of garbage from the galley over the passageway in question to the ship's rail for dumping overboard. It was not shown whether the apple skin had dropped out of one of the garbage cans or had been dropped otherwise. The court reversed the decision of the trial court and remanded the case for new trial, stating that it became necessary to consider *whether there was sufficient evidence on the issue of unseaworthiness to raise questions of fact which only the trial judge could resolve.* The Court further stated there was some testimony to support possible inferences (1) that the absence of garbage chutes on the vessel was the proximate cause of the accident, and (2) that comparable vessels generally are provided with such chutes. The Court stated, with reference to the standard required:

> "And so, we hold, although the owner is absolutely liable for failure to provide a vessel which measures up to the standard of the law, that standard is not perfection but reasonable fitness."

The instant case is readily distinguishable from the cases cited by appellant. In Petterson vs. Alaska Steamship Company, 205 F. 2d 478 (C.C.A. 9th, 1953), affd. 347 U.S. 396, 74 S.Ct. 601 (1954), a block broke while in ordinary use in the customary manner.

In Pacific Far Eastern Lines vs. Williams, (C.C.A. 9th, 1956), 234 F.2d 379, certiorari denied 352 U.S. 871, 77 S.Ct. 96, there was frost on a hatch combing coupled with poor lighting.

In Carlisle Packing Company vs. Sandanger, 259 U.S. 255, 42 S.Ct. 475, a can labelled "Kerosene" was filled with gasoline, thus unquestionably rendering the vessel unseaworthy. In some of the cases cited by appellant the vessel was unseaworthy, as a matter of law. In others the Court could decide as a question of fact.

In the instant case, we are in effect called upon to decide whether a piece of small line from 7 to 12 inches long rendered a vessel unseaworthy as a matter of law. We think at the very most only a fact issue was raised. We could no more hold as a matter of law that the presence of the short length of line rendered the vessel unseaworthy than we could hold as a matter of law that a spot of grease or oil, a piece of slippery paper, or an apple skin, rendered the vessel unseaworthy simply because it proximately caused a fall and injury. Appellant testified that the engine room was seaworthy as he understood the term. This of course did not foreclose his right to submit the issue to the jury for its determination.

By not requesting the submission of an issue for the determination of the jury on unseaworthiness, appellant waived such ground of recovery. He cannot now undertake to recover under a theory that he abandoned before the trial court charged the jury.

> "When the complaint is that the court has wholly failed to submit to the jury the controlling issues necessary to establish an independent ground of recovery or of defense, the party relying upon such ground must request the submission of such omitted issues in substantially correct form, or he will waive the ground of recovery or defense." (3 McDonald, Texas Civil Practice 1148, Sec. 12.32).

See also Rule 279, Texas Rules of Civil Procedure; 3-A Tex. Jur. 244, Appeal and Error, Sec. 188, and Ramm v. Ramm, 294 S.W. 2d 174.

Appellant's second point asserts the trial court erred in not submitting to the jury a charge containing issues, definitions and instructions making clear the federal law as to the distinction between the absolute and nondelegable duty of the employer and the duty of ordinary care imposed upon the employee.

There can be no question that in cases brought under the Jones Act or the Federal Employers' Liability Act, the State court must follow the law as established by federal decisions. This is too clear for the citation of authorities. Appellant relies heavily on Thompson v. Gibson, 290 S.W. 2d 305 (Ft. Worth Civ. App. 1956), reversed and rendered by the Texas Supreme Court, 298 S.W. 2d 97, reversed per curiam 78 S. Ct. 2, order in compliance 310 S.W. 2d 564. The jury found that the defendant was negligent in failing to use gravel of a uniform size and

in failing to pack it between the railroad tracks and in failing to provide a smooth walkway for plaintiff. The United States Supreme Court, in reversing the Texas Supreme Court, which held there was no evidence of negligence, stated:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

In the instant case the court submitted Special Issue No. 5, reading:

> "Do you find that at, and immediately prior to, the time Eugene D. Guthrie suffered injury, if any, the presence of the line, if any, made that part of the deck where it lay not a reasonably safe place to work?"

to which the jury answered: "We do not."

In connection with Special Issue No. 5, the court gave the following definition:

> "By the term 'reasonably safe place to work' is meant a place in which the work to be carried on can be done with reasonable safety."

We think this definition is correct and adequate.

Appellant's requested Issue No. 15, which was refused, reads:

> "Do you find from a preponderance of the evidence that Defendant failed to furnish to Eugene D. Guthrie, at the time and on the occasion of his injury, if any, a reasonably safe place in which to work?"

The only thing that could possibly have rendered the place not reasonably safe was the presence of the line in question. The court properly confined the Issue to whether the presence of the line made that part of the deck where it lay not reasonably safe. The instruction in connection with appellant's requested Issue was an instruction on law with which the jury were not concerned. Further, the instruction was not a correct statement of the law in that under the Jones Act there must be employer negligence to create liability for not providing a safe place to work.

In West v. United States (E.D. Pennsylvania 1956), 143 F. Supp. 473, the court stated:

> "Unlike the distinct and sometime overlapping duty to provide a seaworthy vessel and appurtenances, a shipowner's duty to provide a safe place to work is not an absolute duty; rather, it is a requirement of reasonable care under the circumstances. Brabazon v. Belships Co., 3 Cir., 1953, 202 F. 2d 906. It is not a unique and separate ground of liability but rather liability predicated upon negligence. Cookingham v. United States, 3 Cr. 1950, 184 F. 2d 213, see opinion of Chief Judge Kirkpatrick, D.C.E. Pa., 1949, 87 F. Supp. 203, 205."

There was no evidence of inadequate lighting and no request for submission of an independent issue thereon or for its inclusion in the court's Issue No. 5. We think appellant's contention relative to his requested issue and instructions is without merit.

Appellant cites Cox v. Esso Shipping Company, 247 F. 2d 629, with reference to instructions that should be given a jury as to the duty of a shipowner in an action for unseaworthiness. In that case the court distinguished between

the absolute duty to provide a seaworthy vessel and the standard of due care under the Jones Act. In the instant case no instruction was required in connection with seaworthiness since no issue was requested with respect thereto. Indeed, the instruction requested by appellant in connection with such issue was not necessary to enable the jury to properly pass upon and answer Issue No. 5 relative to a safe place to work and the giving of such instruction would have been improper and error. Boaz vs. White's Auto Stores, 141 Tex. 366, 172 S.W. 2d 481; Texas Bus Lines vs. Whatley, 210 S.W. 2d 626, ref. n.r.e.

The court refused appellant's requested Issue No. 9, reading:

> "Do you find from a preponderance of the evidence that the Defendant failed in its duty to inspect Eugene D. Guthrie's place of work?

We think the court properly refused this Issue and the instruction in connection therewith. Appellant stood the 12 to 4 a.m. watch in the engine room where the injury occurred at 2 o'clock a.m. As third engineer on watch it was his responsibility, according to his testimony, to make inspections to determine the presence of gear adrift about the deck. He further testified that it had been his practice in making his inspections to pick up a thing like the line in question and to put it in a safe place, and that if he had seen it before the accident that's what he would have done, whether it was a part of his job or not.

Appellant contends that under the governing union contract, appellant was forbidden to do clean-up work. Under such contract appellant, as a licensed engineer, was *not required* to do clean-up work customarily assigned to unlicensed personnel, and usually done by wipers. As officer

on watch, however, the responsibility of inspection was his. He had two unlicensed men on watch with him and as their senior it was his responsibility and duty to tell them to clean up any oil spills or pick up loose gear. The court submitted Special Issue No. 12 inquiring whether appellant failed to make a proper inspection of the area in question during the two hours he was on watch prior to his fall, and the jury answered in the negative. Since appellee's duty of making a proper inspection, though nondelegable, was reposed for the time in appellant, the jury's finding should be construed as exonerating appellee of any failure to make a proper inspection. Regardless of that, an inspection could only have disclosed the presence of the line which admittedly was on the deck but which the jury found did not render that part of the deck a place not reasonably safe to work. Further, there was no evidence that appellee had failed in its duty of inspection. Appellant testified that he was not saying that the people on watch before him were negligent in any way. There is no evidence that they were.

The court did not err in refusing to give Special Issue No. 12, requested by Appellant, inquiring whether a fellow-employee of Eugene D. Guthrie left the line on the deck where appellant suffered his injury. There is no evidence as to how the line got at the place in question or how long it had been there. Appellant testified he did not know how it got there. He did state, however, that "they were painting in there. I do not know whether they were using it to tie a bucket, but I do not know." If we assume, however, that the jury might have drawn an inference from such negative testimony and have found that the line was left by a fellow employee, we are still confronted with the proposition that the submission would

have been in effect a double submission. The court in its charge specifically inquired as to whether the presence of the line made the deck where it lay not a reasonably safe place to work, and the jury found that it did not. If, in addition to such issue, the jury was asked whether an employee left the line where it was and whether it was negligence to do so, the inquiry would have covered the same issue, or a phase or shade thereof. It was not the leaving of the line but its presence on the deck that might have threatened harm and made the place unsafe for work.

Moreover, the jury exonerated both appellant and appellee of all negligence in finding that the occurrence in question was the result of an unavoidable accident. The jury was instructed in connection with the submission of the issue as to whether the accident was or was not an avoidable accident, that

> "By the term 'unavoidable accident', as used herein, is meant the unforeseen and unanticipated happening of an event occurring without either the Defendant or the Plaintiff being guilty of negligence that proximately caused the accident in question, if any."

The finding of the jury negated negligence in all particulars.

Had there been alleged defects, other than the presence of the line in question, it would have been proper for the court to have submitted issues covering such other defects that might have made the deck an unsafe place to work. Roosth & Genecov Production Co. vs. White (Tex. Sup.), 262 S.W. 2d 99. Appellant, however, did not prove any defect allegedly making the deck unsafe, other than the presence of the line which was included in the issue answered by the jury adversely to appellant's contention.

The ultimate issue given adequately covered the requested issue, Rule 279, Texas Rules of Civil Procedure; S. H. Kress & Co. v. Selph, 250 S.W. 2d 883, ref., n.r.e.; Serna vs. Cochrum, 290 S.W. 2d 383, Ref., n.r.e.; Fullingim vs. Dunaway, 267 S.W. 2d 482, no writ history. The law is well settled that it is not necessary to submit a special issue covering an evidential or subordinate fact (in the instant case, how did the line get there or who left it?) which is necessarily embraced in the determination of the ultimate fact (did the presence of the line, regardless of how it got there, make that part of the deck where it lay not a reasonably safe place to work?). Wichita Falls & Oklahoma Ry. Co. v. Pepper (S. Ct.), 135 S.W. 2d 79. See McDonald, Texas Civil Practice, Sec. 12.09; Northeast Texas Motor Lines vs. Hodges (Tex. Com. App.), 158 S.W. 2d 487, in which the court stated:

> "It has never been the policy of the law to lengthen and complicate special issue charges by requiring trial courts to give issues that merely submit various phases or other shades of meaning of an issue already in the charge. It is required only that each controlling issue raised by the pleadings and the evidence be submitted, once, fairly, simply and succinctly. Otherwise, such charge could be drawn out to interminable length confusing not alone to the jury but to court and counsel as well."

We think the case was fairly and adequately submitted and that the jury's findings should stand.

The judgment of the trial court is affirmed.

/s/ Ewing Werlein
Associate Justice

Judgment rendered and opinion filed January 15, 1959.

APPENDIX "C"

In the cause

EUGENE D. GUTHRIE, Appellant

No. 13,292

vs.

From District Court of Harris County
Tr Ct # 459,166
Opinion by Werlein, J.

SINCLAIR REFINING COMPANY, Appellee,

the following judgment was rendered on January 15, 1959:

> "This cause, being an appeal from the judgment rendered and entered by the court below on December 23, 1957, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Eugene D. Guthrie, and his surety, Old Colony Insurance Company, pay all costs incurred by reason of this appeal and all such trial court costs as were therein adjudged against the said appellant. It is further ordered that this decision be certified below for observance."

APPENDIX "D"

In the cause

EUGENE D. GUTHRIE, Appellant

No. 13,294

vs.

From District Court of Harris County
Tr Ct. = 459,166
Opinion by

SINCLAIR REFINING COMPANY, Appellee,

the following order was entered February 5, 1959:

"It is ordered that appellant's motion for rehearing be overruled."

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

No. A-7219 April 15, 1959

Eugene D. Guthrie From Harris County,

vs.

Sinclair Refining Company First District.

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the First District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicant, Eugene D. Guthrie, and surety, Old Colony Insurance Company, pay all costs incurred on this application.

APPENDIX "F"

No. A-7219 May 20, 1959

Eugene D. Guthrie From Harris County,

vs.

Sinclair Refining Company First District.

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and after due consideration, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "G"

Title 46, Sec. 688, U.S.C.A.

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *"

APPENDIX "H"

Title 45, Sec. 54, U.S.C.A.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *"

APPENDIX "I"

U. S. Constitution, Article III, Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * "

Title 28, Sec. 1333(1), U.S.C.A.

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

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FILED
OCT 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 369

EUGENE D. GUTHRIE, *Petitioner*

v.

SINCLAIR REFINING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1959

No. 365

EUGENE D. GUTHRIE, *Petitioner*

v.

SINCLAIR REFINING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas is reported at 320 S.W. 2d 397 and appears in the Petition as Appendix "B". The judgment of the 127th District Court of Harris

County, Texas, is not reported, but appears in the Petition as Appendix "A".

Jurisdiction

Jurisdiction is asserted by the petitioner under Title 28, U.S.C., Section 1257 (3). This case was brought under the Jones Act, Title 46, U.S.C., Section 688; and unseaworthiness was also alleged under the general maritime law of the United States. By failing to request any charge to the jury on unseaworthiness, this part of the case was waived in the trial court.

Questions Presented For Review

This appeal presents a case under the Jones Act and general maritime law, in which the jury returned a verdict in favor of the defendant. The trial court, the Texas Court of Civil Appeals, and the Texas Supreme Court have all held that the defendant, Sinclair Refining Company, was entitled to a judgment on the verdict. The only real question on this appeal is whether a judgment in favor of a defendant steamship owner should be reversed where the plaintiff can point out some piece of material board the vessel which caused his injury, without any determination from the jury of unseaworthiness or of negligence against the ship owner.

In legal terms, the questions presented for review on this appeal are:

1. Should the judgment in favor of the defendant be reversed, when no negligence was found by the jury, and no issue of seaworthiness was requested, because the line on the deck was a "proximate cause" of plaintiff's injury, but did not make the area an unsafe place to work?

2. Has the submission of this case to the jury, in special issues under the Texas Rules of Civil Procedure, denied plaintiff any rights as a seaman?

Statutes and Rules Involved

In Addition to the statutes mentioned in the Petition, Rules 273, 274, 277 and 279 of the Texas Rules of Civil Procedure are involved. These rules are set out in Appendix "A". In so far as the petitioner contends that these rules are novel, mysterious or unjust, Rule 49(a) of the Federal Rules of Civil Procedure is comparable to the Texas rules, and it is included in Appendix "A".

Statement

This suit was brought to recover damages under the Jones Act and for alleged unseaworthiness. The only witness to the accident was the petitioner, Guthrie, who claims he twisted his knee when he stepped on a short piece of line, lying on the deck of the engine spaces of the defendant's ship, while he was engineering officer on watch.

The case was tried to a jury under the Texas special issue practice. Petitioner did not request that any issue of unseaworthiness be submitted to the jury. The jury found that there was no negligence, but the accident was unavoidable. It further found the line on the deck was a "proximate cause" of Guthrie's injury, but that it did not make an unsafe place to work.

Judgment for the defendant, Sinclair Refining Company, was entered on the verdict, and has been affirmed by the Texas Court of Civil Appeals, and the Texas Supreme Court.

Argument

I.

Should the judgment in favor of the defendant be reversed, when no negligence was found by the jury, and no issue of seaworthiness was requested, because the line on the deck was a "proximate cause" of plaintiff's injury, but did not make the area an unsafe place to work?

Plaintiff had two theories on which he sought to recover damages of the defendant. One theory was that the line on the deck caused that portion of the vessel to be unseaworthy. The second theory was that the line on the deck caused that part of the ship to be an "unsafe place to work", which was caused by negligence, for which the defendant was liable under the Jones Act.

Plaintiff requested a jury trial. Accordingly, any issue of fact must be determined by the jury. The right to a jury trial applies equally to the defendant, Sinclair Refining Company, as to the plaintiff, Guthrie.

As there was no evidence to show how long the piece of line had been on the deck, there are many decisions which support the conclusion that no issue of unseaworthiness was raised.[1] But if the evidence does raise an issue, it is, at best, a fact question which must be decided by

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[1] **Cookingham v. U. S.**, 181 F.2d 213 (C.C.A. 3d 1950); **Daniels v. Pacific Atlantic Steamship Co.**, 120 F.Supp. 96 (E.D. N.Y. 1954); **McDonald v. Dingwall Shipping Co.**, 135 F.Supp. 374 (S.D. Tex. 1954); **Spero v. THE ARGODON**, 150 F.Supp. 1 (E.D. Va. 1917); **Sloan v. Steamship Alcoa Pennant**, 1959 A.M.C. 136 (S.D. Ala. 1958). This question will apparently be reviewed by the Supreme Court in **Mitchell v. Trawler Racer, Inc.**, 265 F.2d 126 (C.C.A. 1st 1959) in which certiorari has just been granted.

the jury, before the defendant can be held liable to the plaintiff on this theory.[2]

Guthrie testified he believed the engine spaces were seaworthy, as he understood the term. (S.F. 88-91) Although Guthrie was not a lawyer, and had not read the court opinions on the subject (S.F. 91), his opinion, as a qualified marine engineer, should be entitled to some weight.

Since the case was tried in the state district court, the Texas Rules of Civil Procedure were followed in submitting the case to the jury. The Texas practice requires that all contested fact issues be submitted to the jury in special issues. If a party fails to request that a ground of recovery be submitted to the jury, such ground of recovery is deemed to be waived.[3] This is substantially the same waiver as the Federal Rules of Civil Procedure provide, where a party fails to request the court to submit a ground of recovery to the jury.[4]

Petitioner's attorney did not request the trial court to submit any issue of unseaworthiness to the jury. This omission was pointed out in defendant's objection to the trial court's charge. Probably petitioner's counsel requested no issue on unseaworthiness because he realized the jury would not return a favorable finding to such an issue, in the face of Guthrie's testimony that he considered

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[2]**Luckenbach v. McCahan Sugar Co.**, 248 U.S. 139, 145 (1918); **Poignant v. United States**, 225 F.2d 595 (C.C.A. 2d 1955); **Troup v. Chicago, Duluth & Georgian Bay Transit Co.**, 231 F.2d 253 (C.C.A. 2d 1916); **Carter v. Pilgrim**, 238 F.2d 702 (C.C.A. 1st 1956); **Pierce v. Erie R.R. Co.**, 158 A.M.C. 1142.

[3]Texas Rules of Civil Procedure, Rules 273, 271, 277 and 279. These are set out in Appendix "A" of this brief.

[4]Federal Rules of Civil Procedure, Rule 49(a). This rule is set out in Appendix "A" of this brief.

the engine spaces to be seaworthy. In any event, petitioner only asked that the issue of "safe place to work" and negligence be submitted to the jury.

Now that the jury has found against petitioner on his negligence theory, petitioner claims that he should have been given a judgment, on a theory of unseaworthiness, which was never submitted to the jury. He claims that the jury's finding that the line on the deck was a "proximate" cause of the injury is equivalent to a finding of unseaworthiness.

This is a novel theory. Unseaworthy means "not suited to the purpose for which it is used." The jury was not asked to determine if the presence of the line caused that area of the deck to be unseaworthy. But the jury did find that the presence of the line did not cause that area of the deck to be an unsafe place to work. The purpose of the deck is to provide a place from which work can be done with safety. If any issue answered by the jury has any relation to the question of seaworthiness in this case, it is the jury's finding on the "safe place to work" issue.

It is most illogical to claim, as does petitioner, that the finding of "proximate" cause establishes a factual basis for a cause of action for unseaworthiness. A seaworthy area, or piece of gear, could be found to be the "proximate" cause of an accident. But this would not create liability, since a shipowner is not required to furnish an absolutely safe work area, or an accident-proof ship.

Having waived his theory of unseaworthiness by failing to request any issue on seaworthiness, petitioner now asks the Court to find unseaworthiness as a matter of

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Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944).

law. Certainly such a finding cannot be made, in the face of the jury's finding that the presence of the line on the deck did not make that area an "unsafe place to work," and the absence of any finding that it made the area "unsuited to the purpose for which it was put".

The trial court did not err in refusing to enter a judgment for Guthrie on this theory of unseaworthiness, which was not established by any jury finding.

II.

Has the submission of this case to the jury, in Special Issues under the Texas Rules of Civil Procedure, denied Plaintiff any rights as a seaman?

Petitioner chose to litigate his case in the state court in Texas. Under the Texas practice, the jury decides the questions of fact. The law questions are decided by the court. The court determines what the controlling fact issues are, and these questions are submitted to the jury. Any legal terms of art, such as "proximate cause", "seaworthy", "negligence" and the like, are defined in the court's charge. The court does not tell the jury what the law is, as the jury is not concerned with the law.[5]

Many of the lengthy charges, which petitioner's counsel requested be given, and the trial court refused, concerned questions of law with which the jury was not concerned. Petitioner did not request the trial court to give any issue or definition of unseaworthiness to the jury.

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[5]Rule 277, Texas Rules of Civil Procedure; **Boaz v. White's Auto Stores**, 141 Tex. 306, 172 S.W.2d 481 (1943); **Alexander Schroeder Lumber Co. v. Corona**, 28 S.W.2d 859 (Tex. Civ. App. 1930); **Brazos River Conservation & Reclamation Dist. v. Harmon**, 137 S.W.2d 981 (Tex. Civ. App. 1941).

Only the theory of negligence under the Jones Act was requested.

The trial court submitted to the jury the controlling issue under the Jones Act theory, as requested by petitioner. That was—did the line on the deck cause that area of the ship to be an unsafe place to work—and was such condition, if unsafe, a result of the defendant's negligence? The jury found it was not an unsafe place—and further found the accident was unavoidable, not caused by negligence.

If the presence of the line did not make the place unsafe, how the line got on the deck, or whether an inspection should have been made, become immaterial. Whether inspection should be made of a "safe place to work," and determining how the place came to be a "safe place", might be interesting, but are certainly unnecessary, inquiries.

There is no evidence that the line came onto the deck through anyone's negligence. (S.F. 91) Guthrie admitted he had the duty, as engineering officer on watch, to inspect. (S.F. 86; 43, 44) The refusal of the trial court to submit issues on these matters certainly did not deny to Guthrie any right to a proper submission of the case.

In last analysis, petitioner is faced with the jury's findings that the line on the deck did not make it an unsafe place to work, and the accident was not caused by negligence. Petitioner therefore feels that some other type ques-

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[fn] In **Arnold v. Panhandle & S.F. R.R. Co.**, 353 U.S. 360 (1957) this court held that the only controlling issue in a case under the F.E.L.A. is the question of safe place to work. The jury answers to other issues, under the Texas practice, were disregarded by this court.

Arnold v. Panhandle & S.F. R.R. Co., supra

tion should have been given to the jury, so that a different answer might have been obtained.

Petitioner's complaint, in this case, is not in the issues submitted to the jury, but is against the conclusion reached by the jury in answer to the issues which were submitted. Unfortunately for petitioner, the jury found that his $2378 damages were not proximately caused by negligence, but were the result of an unavoidable accident. If petitioner is to recover damages in such circumstances, it should be by Act of Congress, amending the Jones Act to so provide, and not by complaint of the courts in enforcing the law, upon a jury's finding of the facts against him.

The trial court did not err in refusing to grant a new trial for the procedural objections raised to the manner of submitting the case to the jury.

Conclusion

The petitioner was given a speedy and public trial by jury, to which he is entitled under the Constitution of Texas, and the United States. The jury resolved the facts against petitioner, and a judgment for the defendant was entered in the trial court. A thorough review of petitioner's trial has been given by the Texas Court of Cival Appeals, and the judgment was affirmed. The Texas Supreme Court found no error, requiring a reversal of the judgment, when resort was made to that court. Twelve jurors, and thirteen judges have examined petitioner's cause, under our judicial processes, with a unanimous result.

The writ of this Court to further review this cause is not merited by the record, and should therefore be denied.

Respectfully submitted,

TOM M. DAVIS
FRANK G. HARMON
B. D. McKINNEY
Attorneys for Respondent, Sinclair Refining Company

Of Counsel

BAKER, BOTTS, ANDREWS & SHEPHERD

Certificate of Service

I, Tom M. Davis, an attorney of Baker, Botts, Andrews & Shepherd, certify that a copy of this brief has been delivered on this _____ day of October, 1959, to Mandell & Wright, attorneys for petitioner.

APPENDIX "A"

Rule 273. Special Charges

Either party may present to the judge and request such written instructions, special issues, definitions or explanatory instructions, as he desires to be given to the jury; and the judge may give them or a part thereof, or he may refuse to give them, as he may see proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any instructions, special issues, definitions or explanatory instructions shall be made separate and apart from such party's objections to the court's charge. As amended by order of October 12, 1949, effective March 1, 1950.

Rule 274. Objections and Requests

A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. Where the objection made by the complaining party, or an instruction, issue, definition, or explanatory instruction requested by him, is in the opinion of the appellate court obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. Amended by order of September 20, 1941, effective December 31, 1941.

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense and necessarily referable thereto, are submitted to and

answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. [Amended by Order of March 31, 1941.

Rule 49. Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS: The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 365

EUGENE D. GUTHRIE, *Petitioner*

v.

SINCLAIR REFINING CO., *Respondent*

MOTION FOR REHEARING

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MOTION FOR REHEARING

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Motion and Ground

Petitioner respectfully moves this Honorable Court, under Rule 58, to set aside its judgment denying certiorari, entered November 9, 1959, and to grant a rehearing. Petitioner's motion to extend the time for the filing of this motion to December 28, 1959, was timely made and granted.

As ground for the motion, which is based upon intervening action of this Court of substantial or controlling effect, Petitioner would show that subsequent to the judg-

ment of the Court denying certiorari in this case, certiorari was granted in No. 176, *Frank C. Mitchell v. Trawler Racer, Inc.*

As will appear more fully in the argument below, the questions involved in both No. 176 and No. 365 (this case) are questions of "transitory unseaworthiness". A manifest hardship will be worked on Petitioner if certiorari is granted in the *Mitchell* case and denied here. It will be cold comfort to Petitioner to learn, after time has made it impossible for him to take advantage of it, that his position, after all, was correct.

This is the precise consideration that impelled the Court to grant certiorari in *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34, footnote 1, 50 S.Ct. 9, 10 (1929).

Argument

In No. 176, *Mitchell v. Trawler Racer, Inc.*, the facts are substantially identical to those in the instant case. The immediate agency which proximately caused Mitchell's injury was slime on a hand rail, in Petitioner's case, a rope on the floor-plates. *Mitchell v. Trawler Racer, Inc.*, 265 F. 2d 426, 432; 167 F. Supp. 434. In neither instance was there notice to the ship owner. In both cases, this was treated as determinative of the issue of unseaworthiness. *Ibid.*; *Guthrie v. Sinclair Refining Company*, 320 S.W. 2d 396, 399 (Houston Civ. App. 1959). In both cases, that ruling was based on the line of cases beginning with *Cookingham v. United States*, 184 F. 2d 213 (C.C.A. 3d, 1950). *Mitchell*, 426 F. 2d 433; *Guthrie*, 320 S.W. 2d 396, 399.

But *Cookingham* has been written out of the law by the Ninth Circuit in a case which this Court affirmed *per curiam*, *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478

(C.C.A. 9th, 1953), affirmed 347 U.S. 396, 74 S. Ct. 601 (1954). In *Petterson*, since the offending block was not even the property of the ship owner, it is clear there was neither notice nor knowledge of the unseaworthiness condition of the block. See *Poignant v. United States*, 225 F. 2d 895, 897 (C.C.A. 2d, 1955), where, with specific reference to *Cookingham* and its following cases, Judge Hincks wrote:

> "The Petterson case, later decided, makes it plain that the results reached in this line of cases cannot be justified by the mere fact that the existence of such a condition was not brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition."

and in *Grillea v. United States*, 232 F. 2d 919 (C.C.A. 2d, 1956), Judge Hand wrote, at 923,

> ". . . to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect."

The concept under which a ship owner escapes his absolute liability for unseaworthiness, when the unseaworthiness can be shown to be "transitory" has recently been dealt a further blow by the Ninth Circuit and by this Court in *Yanou v. Weyerhauser Steamship Company*, 250 F. 2d 74 (C.C.A. 9th, 1957). Judge Denman wrote, at 75:

> ". . . it is now a long established law that a ship owner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the ship owner has no knowledge of the presence of the oil or grease."

Certiorari was denied by this Court, *Weyerhauser Steamship Company v. Yanou*, 356 U.S. 937, 78 S. Ct. 779 (1958).

The ground upon which the doctrine was distinguished and so held of no force in *Kurtz v. United States*, 121 F. Supp. 856 (S.D. Texas, Houston Div., 1953), that the vessel was at sea and her crew members the only persons who might have caused the unseaworthy condition, 121 F. Supp. at 858, exists here too. (S.F. 61.)

The effect of the holdings in both *Mitchell*, 265 F. 2d 426, especially at 430-432, and in *Guthrie*, 320 S.W. 2d 396, 399, strikes at the roots of the whole doctrine of unseaworthiness. These cases constitute a return to the position that notice, time, negligence, non-negligence, and other such concepts can be made to serve to insulate the ship owner from the liability without fault imposed by the requirement of seaworthiness. This is precisely the erroneous defensive position which was destroyed, step by step, in this Court's landmark decisions: *Mahnich v. Southern Steamship Company*, 321 U.S. 96, 64 S. Ct. 455 (1944); *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), and *Pope and Talbott v. Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953).

Conclusion

If all these considerations had power to move the Court to grant certiorari in No. 176, justice calls for certiorari in the instant case as well; for the similarity on facts is such that the same law must be controlling.

WHEREFORE, premises considered, Petitioner prays that this Honorable Court will set aside its judgment of November 9, 1959, denying certiorari, and will grant a re-

hearing; and that upon rehearing, the writ of certiorari may be granted for the consideration of the fundamental question involved in this case as in No. 176, *Mitchell v. Trawler Racer, Inc.*

Respectfully submitted,

MANDELL & WRIGHT

By

Arthur J. Mandell
Attorney of Record for Petitioner

Certificate of Service

I, Arthur J. Mandell, an attorney of the Bar of this Court, counsel of record for Petitioner, having previously entered my appearance for Petitioner, hereby certify, under Rule 33, sub-section 3(b), that I have served a copy of the above and foregoing motion for rehearing by depositing a printed copy of the same in a United States mail box, with first-class postage prepaid, addressed to Messrs. Baker, Botts, Andrews & Shepherd, counsel of record for Respondent, at their post office address, Esperson Building, Houston 2, Texas.

Arthur J. Mandell